KYOHEI HOSOI

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, MELAKA
AUGUSTINE PAUL JC
[CRIMINAL REVISION NO. 43-4-1997]
8 DECEMBER 1997

IMMIGRATION: *Offence under Immigration Act - Prosecution by Director General of Immigration - Whether such prosecution conflicts with art. 145(3) of Federal Constitution - Immigration Act 1959/1963, s. 58(2) - Whether unconstitutional and null and void*

CONSTITUTIONAL LAW: *Prosecution - Prosecution by authority other than Attorney General/Public Prosecutor - Whether prosecution by Director General of Immigration ultra vires Federal Constitution - Whether s. 58(2) of Immigration Act 1959/1963 ultra vires arts. 4(1) & 145(3) of Federal Constitution*

CRIMINAL PROCEDURE: *Prosecution - Prosecution by authority other than Attorney General/Public Prosecutor - Prosecution instituted by Director General of Immigration - Whether regular - Whether curable - Criminal Procedure Code, s. 422*

The accused was charged for an offence under s. 55B(1) & (3) of the Immigration Act 1959/1963 ('the Act'). The prosecution was instituted pursuant to sanctions to prosecute given to the Director General of Immigration ('the DG') in accordance with s. 58(2) of the Act. The accused entered a plea of not guilty and then moved the Magistrate's Court for an order to refer the case to the High Court under s. 30(1) of the Courts of Judicature Act 1964. In support of the application the accused submitted that s. 58(2) of the Act conflicted with art. 145(3) of the Federal Constitution ('the FC') and was therefore void. The issue for determination was whether the powers of the DG to sanction the institution of any prosecution under the Act as provided for in s. 58(2) of the Act was *ultra vires* art. 145(3) of the FC.

Held:

[1] Article 145(3) of the FC expressly provides that the Attorney General's ('the AG') powers to institute, conduct or discontinue any proceedings for an offence are exercisable at his discretion. The use of the word 'discretion' in art. 145(3) of the FC means that the AG has been endowed

with the power to decide as he thinks fit, as explained in *Long Samad & Ors v. PP*. It is therefore manifestly patent that the discretion to institute a prosecution is within the exclusive domain of the AG. The result of s. 58(2) of the Act giving power to the DG to sanction the institution of a prosecution means that his power is parallel to that of the AG. As laid down in *Repco Holdings Bhd v. PP*, all laws passed by Parliament have to be read subject to the supreme law of the country which is the FC. Article 4(1) of the FC provides that any law which is inconsistent with the FC shall to the extent of the inconsistency, be void. The corollary is that s. 58(2) of the Act which empowers the DG to sanction the institution of a prosecution is void. Therefore s. 58(2) of the Act is unconstitutional, null and void and of no effect, save to the extent as indicated.

[2] Following the judicious stand in *Repco Holdings Bhd v. PP* in accordance with *PP v. Dato Yap Peng* and *Mamat Daud v. Government of Malaysia*, the declaration of invalidity of the instant provision of law under consideration should be prospective only and should include only the case in consideration and the cases registered as from that day.

[3] As the prosecution in the present case had been instituted by a body not authorised to do so, it was a nullity. Accordingly, the defect in the institution of the prosecution was not curable under s. 422 of the Criminal Procedure Code.

[Discharged not amounting to acquital ordered.]

Cases referred to:
Johnson Tan Hang Seng v. PP [1977] 2 MLJ 66 ***(refd)***
Mamat Daud v. Government of Malaysia [1988] 2 CLJ 771 ***(foll)***
Long Samad & Ors v. PP [1974] 2 MLJ 152 ***(refd)***
PP v. Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116 ***(refd)***
PP v. Dato Yap Peng [1987] 1 CLJ 550 ***(foll)***
PP v. Lim Shui Wang & Ors [1979] 2 MLJ 65 ***(refd)***
Repco Holdings Bhd v. PP [1997] 4 CLJ 740 ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 30(1)
Criminal Procedure Code, s. 422
Federal Constitution, arts. 4(1), 145(3)
Immigration Act 1959/1963, ss. 55B(1), (3), 58(2)
Securities Commission Act 1993, s. 39(2)
Securities Industry Act 1983, s. 126(2)

Other source referred to:
Black's Law Dictionary, 6th edn

[Editor's note: For a recent case on the institution of criminal proceedings by a body other than the Attorney General please see also PP v. Pengurus, MBf Building Services Sdn Bhd [1998] CLJ JT(1); [1998] 1 CLJ 678.]

For the applicant - Yap Koon Roy; M/s Yap Koon Roy
For the respondent - Anslem Charles Fernandis DPP

Reported by Michele Saw

JUDGMENT

Augustine Paul JC:

In Arrest Case No 83-626-97 and Arrest Case No 83-628-97 the accused persons were charged for an offence under s. 39(b) of the Immigration Rules 1963 and s. 55B(1)(3) of the Immigration Act 1959/1963 ('the Act') respectively in the Magistrates' Court at Melaka. Both prosecutions were instituted pursuant to sanctions to prosecute given by the director general of Immigration in accordance with s. 58(2) of the Act which reads as follows:

> (2) No prosecution shall be instituted in respect of any offence against this Act without the sanction in writing of the Director General or of the Public Prosecutor or his Deputy.

The material parts of both the sanctions read as follows:

Sanction in Arrest Case No 83-626-97

KEIZINAN UNTUK PENDAKWAAN

> Pada menjalankan kuasa yang diberikan kepada Ketua Pengarah Imigresen oleh Seksyen 58(2) Akta Imigresen 1959/63 yang telah diletakhakkan kepada saya mengikut Seksyen 3(3)(b) Akta tersebut secara bertulis melalui surat bil: IMI/HQ/28/62 bertarikh 19hb. September, 1979.
>
> Saya, CHE MAMAT BIN ABDULLAH, Pengarah Imigresen Negeri Melaka, untuk dan bagi pihak Ketua Pengarah Imigresen dengan ini mengizinkan pendakwaan terhadap penama seperti tercatit di bawah ini.
>
> Kesalahan dibawah Seksyen 39(b) Peraturan Imigresen 1963.
>
> Hukuman di bawah Seksyen yang sama.

Sanction in Arrest Case No 83-628-97

KEIZINAN UNTUK MENDAKWA

Pada menjalankan kuasa yang diberi kepada Ketua Pengarah Imigresen oleh Seksyen 58(2) Akta Imigresen 1959/63 yang telah diletakhakkan kepada saya mengikut Seksyen 3(3)(b) Akta tersebut secara bertulis melalui surat bil: IMM/HQ/28/63 Pt.II bertarikh 19hb. September, 1979;

Saya DATO' HJ. ASEH BIN HJ. CHE MAT, Timbalan Ketua Pengarah Imigresen untuk dan bagi pihak Ketua Pengarah Imigresen dengan ini mengizinkan pendakwaan KYOHEI HOSOI bagi satu kesalahan di bawah Seksyen 55B(1)(3) Akta Imigresen 1959/63 dan boleh dihukum di bawah Seksyen 55B(1)(3) Akta yang sama.

The pleas were taken from the accused persons in both the cases and upon them entering a plea of not guilty the two cases were fixed for hearing from 10 to 13 December 1997. On 4 December 1997 the accused persons moved the magistrate's court for an order to refer the two cases to the High Court under s. 30(1) of the Courts of Judicature Act 1964 which reads as follows:

30(1) Where in any proceedings in any subordinate court any question arises as to the effect of any provision of the Constitution the presiding officer of the court may stay the proceedings and may transmit the record thereof to the High Court.

(2) Any record of proceedings transmitted to the High Court under this section shall be examined by a Judge of the Court and where the Judge considers that the decision of a question as to the effect of a provision of the Constitution is necessary for the determination of the proceedings he shall deal with the case in accordance with s 84 as if it were a case before him in the original jurisdiction of the High Court in which the question had arisen.

(3) Subsections (1) and (2) shall be deemed to be rules of court for the purpose of Article 128(2) of the Constitution.

In substance the objection raised by the accused persons before the learned magistrate in support of their application was that s. 58(2) of the Act conflicts with art. 145(3) of the Federal Constitution and is therefore void. Accordingly, they contended, the institution of the prosecution against them is irregular. The learned magistrate stayed the proceedings and transmitted the records in both the cases to the High Court.

The matters came up for argument before me this morning. As the issue involved in both the cases is the same both parties agreed that a ruling made in Arrest Case No 83-628-97 shall be binding on Arrest Case No 83-626-97. They further agreed that the issue for determination by this court is whether the power of the director general of immigration to sanction the institution of

any prosecution under the Act as provided for in s. 58(2) of the Act is *ultra vires* art. 145(3) of the Federal Constitution. Learned counsel's submission is anchored on the landmark judgment of Gopal Sri Ram JCA in *Repco Holdings Bhd v. PP* [1997] 4 AMR 3938. In *Repco* the Securities Commission instituted proceedings against Repco Holding Bhd by applying for and obtaining a summons against it for a contravention of s. 86 of the Securities Industry Act 1983. The prosecution was conducted by officers of the Securities Commission in accordance with s. 126(2) of the Securities Industry Act 1983 and s. 39(2) of the Securities Commission Act 1993. Both the provisions are reproduced in full.

Section 126 Securities Industry Act 1983

126. (1) No prosecution for any offence under this Act shall be instituted except with the consent in writing of the Public Prosecutor.

(2) A prosecution for any offence against any provision of this Act may be conducted by the Registrar or by any officer authorised in writing by the Registrar or by any officer authorised in writing by the Chairman of the Commission.

Section 39 of the Securities Commission Act 1993

39 (1) No prosecution for any offence under this Act shall be instituted except with the consent in writing of the Public Prosecutor.

(2) Any officer of the Commission authorised in writing by the Commission may conduct any prosecution of any offence under this Act.

Gopal Sri Ram JCA noted that sub-s. (2) of each of the aforesaid sections vests the conduct of prosecutions in the hands of persons other than the Public Prosecutor. It was argued by learned Counsel that both the provisions were *ultra vires* art. 145(3) of the Federal Constitution which reads as follows:

> The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial.

In construing the meaning of "conduct" in art. 145(3) his Lordship referred to *PP v. Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 where Abdoolcader J (as he then was) said at p. 119:

> 'Conduct' in art. 145(3) cannot but refer to the conduct of prosecutions in court, as it indeed appears *ipsissimis verbis* in s. 377 of the Code. And "control and direction" in s. 376(i) of the Code is in respect of all criminal prosecutions and proceedings, and not of criminal procedure or the jurisdiction of the courts.

> 'Conduct' of criminal prosecutions and proceedings in art. 145(3) cannot connote the regulation of criminal procedure or of the jurisdiction of the courts or the power or discretion to do so. Any contrary contention would in effect in my view be tantamount to the suggestion of the Public Prosecutor arrogating to himself the legislative powers vested in Parliament under Item 4 and in particular para. (b) thereof in List I (Federal List) in the Ninth Schedule to the Constitution, with perhaps also the not inconceptible resultant intrusion or at least a more than peripheral incursion into the sphere of art. 121(1) of the Constitution which provides that the judicial power of the Federation is vested in two High Courts and in such inferior courts as may be provided by federal law namely, the Subordinate Courts Act 1948 which specifies the subordinate courts and their respective civil and criminal jurisdiction.
>
> Pursuing its signification, 'to conduct' means 'to lead, guide, manage' (In *re Bhupalli Malliah* AIR [1959] AP 477; *Pride of Derby v. British Cleanese Ltd* [1953] 1 Ch. 149, at p. 167 per Lord Evershed MR). It conveys the idea of leading and guiding, that is to say, the person who conducts the prosecution determines all important questions of policy involved in the course of the trial and the attitude to be adopted by the prosecution towards material objections raised or demands made by the accused with respect to the evidence.

Gopal Sri Ram JCA then continued at p. 746:

> It will be seen at once, from a plain reading of Article 145(3), that the supreme law, namely the Federal Constitution has committed to the hands of the Attorney General the sole power, exercisable at his discretion, to institute, conduct and discontinue criminal proceedings.

and at p. 747:

> It follows from the foregoing discussion that the only authority that is constitutionally entitled to conduct proceedings is the Attorney General as Public Prosecutor.

His Lordship then posed the following question:

> Is Parliament entitled by written law to vest the power to conduct criminal prosecutions in an authority other than the Attorney General?

And answered it this way at p. 749:

> In my judgment, having regard to the authorities read before me, the expression 'conduct' appearing in Article 145(3) and in the two impugned subsections carries the same meaning. Since the Constitution exclusively authorises the Attorney General to conduct prosecutions, it must follow, as night follows day, that no other authority may be lawfully empowered to exercise that function. Therefore, it is my opinion, that s. 126(2) of the SIA is *ultra vires* Article 145(3) of the Federal Constitution …

And at p. 750:

> Turning now to s 39(2) of the SCA, it is my judgment that this subsection wholly contravenes Article 145(3). By reason of Article 4(1) of the Federal Constitution, it being a law which is inconsistent with the Constitution, the subsection gives way. I would declare it void and unconstitutional.

His Lordship then concluded at p. 751:

> For the reasons I have given thus far, I would declare s. 126(2) of the SIA to be unconstitutional, null and void and of no effect, save to the extent earlier indicated. In the same way, I would declare s. 39(2) of the SCA to be unconstitutional, null and void and of no effect.

The substantial issue before the court in *Repco* was the conduct of a prosecution by a body other than the Public Prosecutor while what is before me is the institution of a prosecution by a body other than the Public Prosecutor. As stated in *Repco* the Federal Constitution has made explicit provisions for the institution and conduct of proceedings for an offence in art. 145(3). The meaning of the words "institute" and "conduct" have been sufficiently dealt with in *PP v. Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116. In *PP v. Lim Shui Wang & Ors* [1979] 2 MLJ 65 the Federal Court considered the meaning of the word "institute" and Suffian LP in writing for the Court said at p. 67:

> The word 'institute' means to set on foot, initiate, start, so that the Attorney General has power, at his discretion, to initiate a case such as the present ones, before a Special President or a High Court Judge. We respectfully agree with Abdoolcader J when he said at p. 119 in *Public Prosecutor v. Datuk Harun bin Haji Idris* [1976] 2 MLJ 116:
>
> > Institute' in article 145(3) ... must necessarily refer to the commencement of proceedings and prosecutions … It may well be ... that the Public Prosecutor has power ... to direct any case triable in the Magistrate's or Sessions Court to be tried in the High Court after a preliminary enquiry. This power to so direct would, if exercised fall squarely within his discretion to institute and conduct criminal prosecutions and proceedings'.

Black's Law Dictionary 6th Edn defines the word "institute" as

> To inaugurate or commence, as to institute an action. *Post v. US* 161 US 583, 16 S Ct 611, 40 L Ed 816. To set up, to originate, to initiate, to start, to introduce.

I must add that art. 145(3) expressly provides that the attorney general's powers to institute, conduct or discontinue any proceedings for an offence are exercisable at his discretion. The use of the word "discretion" in art. 145(3) means that the Attorney has been endowed with the power to decide as he thinks fit (see *Johnson Tan Hang Seng v. PP* [1977] 2 MLJ 66). This was lucidly explained by the Federal Court in *Long bin Samad & Ors v. PP* [1974] 2 MLJ 152 where Suffian LP said at p. 158:

> In our view, this clause from the supreme law clearly gives the Attorney-General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings which he has instituted, and the courts cannot compel him to institute or to go on with any criminal proceedings which he has decided to discontinue. (For the position in England, please see Viscount Dilhornes speech at pp. 32-3 in *Smedleys Ltd v. Breed* [1974] 2 All ER 21). Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature.
>
> Anyone who is dissatisfied with the Attorney-General's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts.

It is therefore manifestly patent that the discretion to institute a prosecution is within the exclusive domain of the Attorney General. That brings into focus the validity of s. 58(2) of the Act which authorises the director general of immigration to sanction the institution of a prosecution. Following the meaning of the word "institute" considered earlier and the definition of the word "sanction" in *Black's Law Dictionary* 6th Edn as

> To assent, concur, confirm, reprimand, or ratify. *US v. Tillinghast*, DCR 155 F 2d 279, 283. Approval or ratification.

a sanction to institute a prosecution means to concur in or approve the commencement of a prosecution. The result of s. 58(2) of the Act giving power to, *inter alia*, the director general of immigration to sanction the institution of a prosecution means that his power is parallel to that of the Attorney General. As I said earlier art. 145(3) of the Federal Constitution confers this power exclusively on the Attorney General. In the premises that part of s. 58(2) of the Act which empowers the director general of immigration to sanction a prosecution is inconsistent with art. 145(3) of the Federal Constitution. As laid down in *Repco* all laws passed by Parliament have to be read subject to the

supreme law of the country which is the Federal Constitution. Article 4(1) of the Constitution provides that any law passed which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void. The corollary is that s. 58(2) which empowers the director general of immigration to sanction the institution of a prosecution is void. I would therefore declare s. 58(2) of the Act to be unconstitutional, null and void and of no effect, save to the extent as indicated.

Following the judicious stand taken by Gopal Sri Ram JCA in *Repco* in accordance with *PP v. Dato Yap Peng* [1987] 2 MLJ 311 and *Mamat bin Daud v. Government of Malaysia* [1988] 2 CLJ 771 I too rule that the declaration of invalidity of the provision of law under consideration shall be prospective only and shall include only this case (including Arrest Case No 83-626-97) and cases registered from today.

As the prosecution in this case has been instituted by a body not authorised to do so it is a nullity. Accordingly, the defect in the institution of the prosecution is not curable under s. 422 of the Criminal Procedure Code. I therefore order that the accused persons be given a discharge not amounting to an acquittal. It is for the Public Prosecutor to decide, at his discretion, on the next course of action to be taken. It is perhaps appropriate for me to add that the stand taken by the Attorney General in this case through the learned Deputy Public Prosecutor in supporting the application by learned counsel is a commendable reflection of his role as the custodian of public interest to uphold the rule of law.